United States Department of Labor
Employees' Compensation Appeals Board

P.T., Appellant	)	
and	)	**Docket No. 21-0110**
	)	**Issued: December 8, 2021**
U.S. POSTAL SERVICE, RUSKIN POST OFFICE, Sun City Center, FL, Employer	)	

Appearances:
Joanne Marie Wright, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 3, 2020 appellant, through her representative, filed a timely appeal from a June 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that following the June 4, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met her burden of proof to expand the acceptance of her claim to include a cervical condition causally related to or as a consequence of the accepted September 3, 2009 employment injury.

FACTUAL HISTORY

On September 3 2009 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right lower back when she tripped and fell to the ground while in the performance of duty. She stopped work on September 4, 2009 and returned to work on September 8, 2009. OWCP accepted the claim, assigned OWCP File No. xxxxxx695, for lumbar sprain. It subsequently expanded acceptance of the claim to include displacement of a lumbar intervertebral disc at L2-3 without myelopathy. On February 11, 2013 appellant underwent an anterior lumbar interbody fusion at L2-3. OWCP paid her wage-loss compensation on the supplemental rolls for intermittent time lost from work. Appellant returned to work for four hours per day on July 22, 2013.

OWCP subsequently accepted appellant's June 24, 2013 occupational disease claim (Form CA-2) for left lateral epicondylitis, assigned OWCP File No. xxxxxx389. Under that file number, appellant began working four hours per day modified duty in April 2014. OWCP paid her based on her loss of wage-earning capacity determination in OWCP File No. xxxxxx389 effective April 29, 2014. It administratively combined OWCP File No. xxxxxx389 and OWCP File No. xxxxxx695, with the latter serving as the master file.

An August 30, 2013 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated mild degenerative disc disease at C4-5 and C5-6 with mild C5-6 kyphosis and mild canal stenosis without cord compression, disc herniation, or fracture.

In a report dated April 23, 2014, Dr. Marc Weinstein, a Board-certified orthopedic surgeon, discussed appellant's complaints of radiating low back pain and neck pain with headaches. On May 6, 2014 he evaluated appellant for new complaints of neck pain, headaches, and bilateral lower extremity pain and continued complaints of low back pain.

On June 3, 2014 Dr. Howard B. Jackson, a Board-certified physiatrist, evaluated appellant for improved headaches, and unchanged neck, low back, right lower extremity, left buttock/sacral, and left lower extremity pain. Regarding the cervical spine, he diagnosed neck pain due to cervical disc pain. Dr. Jackson continued to provide progress reports in 2014 and 2015 describing his treatment of appellant for pain management. On October 15, 2015 he evaluated her for pain in the low back, left buttock/sacral area, left lower extremity, and tailbone. Dr. Jackson noted that appellant had been in an accident on October 6, 2015 that had caused increased pain.

In a report dated January 19, 2016, Dr. Jackson advised that he had initially treated appellant on December 3, 2009 for low back pain.[4] He noted that on May 6, 2014 she complained of neck pain. Dr. Jackson indicated that he had evaluated appellant on October 20, 2015 for increased pain in the same areas following an October 13, 2015 motor vehicle accident (MVA). He diagnosed neck and upper extremity pain as a result of cervical disc pain and radiculitis directly due to her "job as a letter carrier or it is secondary to the increased compensatory forces on her cervical spine from her lumbar fusion."

Dr. Jackson continued to provide reports describing his treatment of appellant for pain management from January through July 2016.

In a development letter dated September 14, 2016, OWCP noted that appellant had claimed neck pain due to cervical disc disorder with radiculitis causally related to her accepted September 3, 2009 employment injury. It informed her, however, that pain was a symptom and thus not compensable. OWCP requested that appellant submit additional factual and medical information in support of her claim, including a reasoned opinion from her physician explaining how a new condition resulted from or was a consequence of her accepted September 3, 2009 employment injury. It afforded her 30 days to submit the requested information.

An MRI scan of the cervical spine dated September 21, 2016 revealed cervical hypolordosis, a central to slightly left disc herniation at C4-5 indenting the dural sac, and disc space narrowing and desiccation due to a broad osteophytic ridge at C5-6.

In a June 17, 2017 statement, appellant's representative requested that OWCP adjudicate whether acceptance of her claim should be expanded to include C4-5 and C5-6 degenerative disc disease and cervical radiculitis as a consequential injury. In support of her request, she resubmitted progress reports from Dr. Jackson dated May 6, 2014 and August 25, 2015, the January 19, 2016 medical report from Dr. Jackson, and the September 21, 2015 MRI scan.

On September 5, 2018 OWCP received an undated statement from appellant asserting that she had been diagnosed with neck pain in the scapular region with radiation due to cervical disc disorder with radiculitis. Appellant denied a cervical condition prior to her February 11, 2013 authorized lumbar surgery. She advised that she had sustained increased neck pain and ringing in the ears after an October 13, 2015 MVA. Appellant indicated that Dr. Jackson found that the accident had aggravated her cervical condition and that her cervical condition was causally related to her work duties or lumbar spinal fusion.

The record contains reports from Dr. Jackson describing his treatment of appellant for pain management from October 2016 through December 2018.

On September 11, 2018 OWCP expanded its acceptance of appellant's claim to include a single episode of severe major depressive disorder without psychotic features.

[4] In a report dated August 22, 2016, Dr. Christopher Linberg, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed left lateral epicondylitis and status post lumbar fusion at L2-3 with continued pain and new radicular symptoms on the left due to progressive adjacent level disease to include a disc herniation at L4-5 and degenerative disc disease at L3-4 and L4-5. He recommended that OWCP authorize additional lumbar surgery. OWCP authorized a lumbar fusion on January 20, 2017.

By decision dated March 6, 2019, OWCP denied appellant's request to expand acceptance of her claim to include a consequential cervical condition.

The record contains physical therapy reports from March through April 2019.

Dr. Jackson continued to submit progress reports regarding his treatment of appellant for pain management.

On March 6, 2020 appellant, through her representative, requested reconsideration. She summarized the medical evidence submitted in support of her request, noting that multiple physicians had described her complaints of neck pain. Appellant's representative further reviewed the results of diagnostic testing. She maintained that the medical evidence demonstrated that appellant's cervical condition had begun after her February 11, 2013 authorized lumbar surgery and requested that OWCP expand the acceptance of her claim to include degeneration of a cervical intervertebral disc and radiculitis.

In support of her request, appellant submitted an April 23, 2013 report from Dr. Keri Herro, a chiropractor. Dr. Herro evaluated her for left elbow pain and noted that she had no history of a prior neck injury or stiffness. She diagnosed neuralgia, neuritis, and radiculitis and cervical segmental dysfunction.

In a report dated December 12, 2013, Dr. Alfred Hess, a Board-certified orthopedic surgeon, discussed appellant's complaints of left elbow pain, a stiff neck, and headaches. He diagnosed lateral epicondylitis.

Appellant further resubmitted Dr. Weinstein's April 23, 2014 report evaluating her for low back pain and neck pain with headaches, progress reports from Dr. Jackson dated August 26, 2014, and June 23, 2015, and a May 6, 2014 report signed by a nurse practitioner. In his reports, Dr. Jackson diagnosed neck pain secondary to cervical disc pain.

By decision dated June 4, 2020, OWCP denied modification of its March 6, 2019 decision.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[5]

Causal relationship is a medical question that requires medical opinion evidence to resolve the issue.[6] The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.[7]

[5] *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[6] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[7] *Id*.

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[8]

ANALYSIS

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include a cervical condition causally related to or as a consequence of the accepted September 3, 2009 employment injury.

In a report dated January 19, 2016, Dr. Jackson indicated that he had begun treating appellant for low back pain on December 3, 2009. Appellant subsequently complained of neck pain on May 6, 2014. Dr. Jackson noted that appellant had increased pain after an October 13, 2015 MVA. He diagnosed neck and upper extremity pain as a result of cervical disc pain and radiculitis due to either her employment duties or as a result of the increased stress on her cervical spine subsequent to her lumbar fusion. Dr. Jackson's opinion, however, is equivocal regarding the cause of appellant's condition and thus of diminished probative value.[9]

The remaining evidence of record fails to address the cause of appellant's condition.

Dr. Jackson provided progress reports dated 2013 through 2019 describing his treatment of appellant for low back, bilateral extremity, and cervical pain. His diagnoses included neck pain arising from a cervical disc condition. Dr. Jackson, however, did not address the cause of appellant's cervical condition. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[10] Thus, the Board finds that Dr. Jackson's reports are of no probative value on the issue of causal relationship and are insufficient to establish appellant's burden of proof.

Similarly, the reports from Dr. Hess and Dr. Weinstein discuss appellant's complaints of neck pain without offering any opinion as to the cause of her conditions. As noted, a medical opinion that lacks an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[11] The Board finds, therefore, that these reports are of no probative value on the issue of causal relationship and insufficient to meet appellant's burden of proof.

[8] *K.S.*, Docket No. 17-1583 (issued May 10, 2018); Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014).

[9] *See M.K.*, Docket No. 21-0520 (issued August 23, 2021).

[10] *See J.M.*, Docket No. 19-1926 (issued March 19, 2021); *L.D.*, Docket No. 20-0894 (issued January 26, 2021).

[11] *Id*.

On April 23, 2013 Dr. Herro, a chiropractor, diagnosed neuralgia, neuritis, and radiculitis and cervical segmental dysfunction; however, this report is of no probative medical value as she did not diagnose spinal subluxation as demonstrated by x-ray evidence to exist.[12]

Appellant further submitted reports from a physical therapist and nurse practitioner. These reports, however, are of no probative value as physical therapists and nurse practitioners are not considered physicians as defined under FECA.[13]

The record contains MRI scans of the cervical spine. However, diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether an employment incident caused the diagnosed condition.[14]

On appeal appellant's representative contends that her authorized lumbar surgery contributed to the progression of her cervical disorder and was thus compensable as a consequential injury. Appellant, however, bears the burden of proof to establish a claim for a consequential injury by providing rationalized medical evidence showing how the subsequently-acquired medical condition is a natural consequence of the prior employment injury.[15] As the medical evidence of record is insufficient to establish causal relationship between appellant's cervical condition and the accepted employment injury, the Board finds that she has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include a cervical condition causally related to or as a consequence of the accepted September 3, 2009 employment injury.

[12] Chiropractors are considered physicians under FECA only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the secretary. *See* 5 U.S.C. § 8101(2); *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *S.D.*, Docket No. 19-1245 (issued January 3, 2020); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[13] Section 8101(2) of FECA provides as follows: "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *C.S.*, Docket No. 20-1354 (issued January 29, 2021); *see also David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *E.W.*, Docket No. 20-0338 (issued October 9, 2020); *Jane White*, 34 ECAB 515, 518 (1983) (physical therapists are not considered physicians under FECA).

[14] *C.H.*, Docket No. 20-0228 (issued October 7, 2020); *E.G.*, Docket No. 17-1955 (issued September 10, 2018).

[15] *See T.S.*, Docket No. 20-0968 (issued August 17, 2021); *C.H.*, Docket No. 20-0228 (issued October 7, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board